Office of the Secretary
ATTN: Marlene H. Dortch
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Comment on Proposed Rulemaking for the Telephone Consumer Protection Act of 1991; CG Docket No. 18-152; CG Docket No. 02-278

Dear Secretary Dortch:

I, Jeffrey A. Hansen, comment as follows concerning the petition for rulemaking regarding the interpretation of the Telephone Consumer Protection Act in light of the Ninth Circuit Court of Appeal's decision in *Marks v Crunch San Diego, LLC*.

1. My name is Jeffrey A. Hansen. I am an adult over the age of 18, a resident of the state of California. Unless indicated otherwise, I have personal knowledge of each of the matters stated herein, and if called to testify I could and would testify competently about them.

Experience and Credentials.

2. I am the principal of Hansen Legal Technologies, Inc. My firm is in the business of handling Information Technology, including investigations and analysis of electronic data. I have served as an expert or consultant in more than 150 class action lawsuits under the Telephone Consumer Protection Act ("TCPA"), and as an expert or consultant in numerous other civil cases.

3. With regard to my experience as an expert and consultant in legal matters, generally, I have frequently served as an expert witness and consultant to law firms in conducting computer forensic analysis. I have also assisted in electronic discovery issues.

4. I also frequently act as a consultant to companies that engage in the use of autodialers, and I am familiar with their use and procedures, and the technical aspects of that business. In that capacity, I have assembled, configured, maintained, operated all aspects of autodialers, and interfaced with the telecommunications providers through whose networks the autodialers operate.

5. I have set up and maintained all aspects of predictive dialers and autodialers, from predictive dialers operating with just three telephone lines to outbound call centers, run from three locations, capable of generating over 1 million calls per hour. When building these systems, I have used various software and hardware solutions for predictive and autodialers, both proprietary and open source, and customized those systems for their particular uses. I myself have used and maintained predictive and autodialers, and trained others to do the same.

6. Over the last twenty-nine (29) years, I have also had extensive experience in a broad range of other areas in the electronic and information technology fields and obtained many certifications such as MCP 4.0, A+, Network+, MCP 2000, MCSA, MCSE, Linux+, I-Net+, Security+, CIW Security Analyst. From the hardware perspective, I have extensive experience in troubleshooting and repairing at the component level, and building various systems for various purposes. I have designed, built and maintained computer networks in a variety of environments from commercial businesses to very large DoD networks. I have taught approximately 1,000 others the skills to become computer network engineers themselves.

7. I have had extensive experience in dealing with security breaches and hardening computer networks against those breaches. I have handled many computer forensic and E-Discovery matters, including internal investigations in companies, volunteering at the FBI sponsored Regional Computer Forensics Laboratory, and founding a computer forensics and E-Discovery firm over 11 years ago. I have also had extensive experience with the set-up and use of predictive and autodialers. (*See Exhibit A – Resume of Jeffrey A. Hansen*).

8. Previously, I have submitted comments on June 12, 2018. Since that time the FCC has sought comment from the public on a number of questions after the Ninth Circuit Court of Appeals Order in the matter of *Marks v Crunch San Diego, LLC*, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) (hereinafter "*Marks*"). My comments submitted on June 12, 2018 apply after the *Marks* decision. Specifically, the Commission has asked for public comment on the question of what constitutes an Automatic Telephone Dialing System.

What constitutes an "automatic telephone dialing system."

9. I have been an Information Technology professional for three decades, including building, installing, and administering predictive and autodialers. As

highlighted in my previous comments following the D.C. Circuit's decision in *ACA International*, I was telemarketing with predictive dialers before the FCC 2003 Order. As a telemarketer, I relied on the FCC 1992 Order and the Statute itself. As a seasoned IT professional, the terms were familiar to me. For example, Computer storage, computer processing, number generators. I knew that computer storage could not be related to the processing function of a computer as computer storage performs no function but to store, I knew that in regards to computers, "generate" and "produce" meant the same thing. The FCC 1992 Order ¶¶ 8-9 took that further and and not only specifically named the predictive dialer as an ATDS, it was the only "agent-dialer" used at that time that would qualify as an ATDS. During that time, as a telemarketer, I did not notice the FCC Request for Comments in 2002, but I did read the FCC 2003 Order once it came out. I was puzzled, this "new technology" was nothing new, predictive dialers always called from lists of numbers and that issue seemed to be settled in 1992. Predictive dialers, as they are today, where invented in 1974 and heavily marketed by Davox throughout the 1980's. Eleven (11) years ago, I began serving as an expert in TCPA matters for anyone that would not ask me to pervert my industry (the IT industry with a niche in autodialers). To this date, with the exception of two, I have only been contacted by plaintiff's counsel. I have served as an expert in several hundred TCPA matters and testified in 267 matters. My Resume is attached as Exhibit A.

10. Even as a telemarketer, I considered The Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq*. ("TCPA") is an incredibly important consumer privacy statute designed to protect consumers from voluminous automated telephone calls. As a telemarketer, I saw the TCPA as a benefit to both me and the consumer. I would never call consumers without consent (or knowing that the number was a business number in Business to Business calls), which means I would never generate random or sequential numbers to call. I was interested in getting the cost per lead to a minimum, and gladly excluded cell phones and implemented suppression lists such as the state and national Do Not Call lists; I wanted to avoid calling emergency numbers, so I relied on lists of

numbers and not random or sequential numbers. Afterall, I did not want to generate a large phone bill calling consumers that will not buy products or services offered.

11. The FCC seeks comment on numerous topics after the Ninth Circuit Court of Appeals in the matter of *Marks v Crunch San Diego, LLC,* 2018 WL 4495553 (9th Cir. Sept. 20, 2018) ("*Marks*").

12. The *Marks* case involved an SMS blasting platform called Textmunication, which is a web-based marketing platform designed to send promotional text messages to a list or database of stored telephone numbers. This is the same system highlighted in paragraph 23 of the 2015 FCC Order.

13. Telephone numbers are captured and stored in three ways: 1) an operator of the Textmunication system may manually enter a phone number into the system or uploading a list; 2) a current or potential customer may respond to a marketing campaign with a text; or 3) a customer may provide a phone number by filling out a form on a website. The system also has the capacity to import a list of telephone numbers to be called. The operator can then design a marketing campaign to automatically send the desired messages to the stored phone numbers at a scheduled time.

14. The Ninth Circuit reviewed the statutory test of the TCPA and the history of FCC Rules and amendments to the TCPA, beginning with the 2003 Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14,014, 14,017 (2003) ("2003 Ruling"). In that ruling, the FCC discussed and analyzed predictive dialers and ultimately ruled that such systems qualify as an ATDS.

15. Personally, I would have wished the Ninth Circuit also considered the FCC's 1992 Ruling, as it specifically names the predictive dialer (which has always called from lists of numbers rather than random or sequential numbers). Predictive dialers were the only "live agent" autodialer at the time.

16. The 1992 FCC Ruling states in paragraphs 8-9:

In the NPRM, the Commission requested comment on whether it is in the public interest to recognize an inherent difference in the nuisance factor between artificial or prerecorded voice calls as opposed to live solicitations. Further, the NPRM raised the issue of whether regulation of live solicitation is necessary to protect residential subscriber privacy rights. Most commenters do not object to some form of restriction on live solicitations, but distinguish between live solicitations, particularly those made by ***predictive dialers*** (which deliver calls to live operators), and solicitations completed by artificial or prerecorded voice messages. These commenters contend that artificial or prerecorded voice solicitations are a greater nuisance and an invasion of privacy, and cite the relatively greater number of complaints to the Commission about this specific mode of solicitation to support this claim. Several commenters, however, cite legislative history in asserting that Congress intended to regulate all solicitations, whether live or artificial or prerecorded voice, because both types of unwanted solicitations represent a nuisance and an invasion of privacy. These commenters note that the figures on consumer complaints received by the Commission, suggesting that live solicitations are much less intrusive, do not fully reflect the volume of complaints regarding live solicitations because not all such complaints are reported directly to the Commission.

While the commenters demonstrate that there are separate privacy concerns associated with artificial or prerecorded solicitations as opposed to live operator solicitations (e.9. calls placed by recorded message players can be more difficult for the consumer to reject or avoid), the record as a whole indicates that consumers who do not wish to receive telephone

> solicitations would object to either form of solicitation. We are persuaded by the comments, the numerous letters from individuals, and the legislative history that both live and artificial or prerecorded voice telephone solicitations should be subject to significant restrictions. Accordingly, as discussed below, we select company-specific do-not-call lists as the most effective alternative to protect residential telephone subscribers from unwanted live and artificial or prerecorded voice message solicitations. For the reasons discussed below, we believe that this alternative most effectively balances the privacy interests of residential subscribers who wish to avoid unwanted solicitations (whether live or by artificial or prerecorded message) against the interests of telemarketers in maintaining useful and responsible business practices and of consumers who do wish to receive solicitations.

17. Although, the Ninth Circuit did not review the FCC 1992 Ruling, the Court did reach the same conclusion without getting into the technical details of the predictive dialer as in the 2003 FCC Ruling.

18. Also, I would have wished the Ninth Circuit considered Robert Bulmash's testimony on July 24, 1991, at the Senate hearing regarding predictive dialers. There, Mr. Bulmash testified that these autodialers called from lists of numbers purchased from list brokers. Predictive dialers work exactly the way Mr. Bulmash describes even to this day, with one exception; today the computer is much faster and can handle many more phone lines and make many more times the number of calls. For example, most dialers, today can easily handle 2,000 phone lines. For me, that translated to over 1 million calls per hour. This Senate hearing can be viewed at https://www.c-span.org/video/?23630-1/telephone-solicitation.

19. I have spent three decades in the IT industry with the last 18 years with autodialers and have heard of no other alternate definition of an autodialer until recent years. In recent years, I have heard many proposed definitions from defense counsel such as the autodialer must generate numbers, the numbers must be stored with a random or sequential number generator, the numbers must be produced by a random or sequential number generator then stored.

20. Finally, several organizations and TCPA defendants proposed a definition that the system must determine what numbers it wanted to call, create a list with that number generator, load the list, and call that list all without human intervention. That proposed definition describes a system that is capable of making business decisions, researching what numbers to call and why, load the list, determine the best times of the day to call each group of numbers, schedule those calls, assign agents to those calls after searching the employee work schedules, selecting a calling mode, creating a pre-recorded message for answering machines, loading that pre-record in the campaign, creating a script for the calling agents to read from which requires a full analysis of the product or service and making determinations on how to construct the message in the script, just to name a few tasks this proposed definition would require the machine to do without human intervention. This would require nothing less than a system that is completely self-aware. Even in the 2003 Ruling, the FCC limited the "human intervention" to dialing.

21. As I stated in my comments dated June 12, 2018:

> "…the next argument by commenters is, 'that would make everything including a cell phone an 'ATDS.' As a computer professional and dialer administrator, I was confused how they could justify such a statement. Commenters would attempt to justify this statement by saying that one could download and install software that makes the cell phone an 'ATDS.' I would point out that an 'autodialer' is a piece of software, either one has the software or

> they do not. A cell phone without autodialing software can not be determined to be an autodialer. Commenters attempt to use the contact list and the fact that you can speed dial as their justification for such an absurd claim, (this was already exempted in the 1992 FCC order (See *See Exhibit D - 1992 FCC Order ¶47; Exhibit E - 1992 FCC Order part 2 ¶47)*), but they ignore that there is no 'automatically dialing' in the examples they use to justify that the industry's strict definition would encompass cell phones. …It would be helpful for the FCC to again clarify, as they did in their 1992 Order, that autodialers do not include systems that were designed to call a single number such as a home security system or speed dial. (*See Exhibit D - 1992 FCC Order ¶47; Exhibit E - 1992 FCC Order part 2 ¶47*) The FCC should also include that it is specific to systems capable of automatically dialing phone numbers such as those found in outbound call centers. This would likely eliminate the "is the cell phone an ATDS" discussion. I would note that in 1992 the FCC has made a distinction between autodialers and non-autodialers that utilize random or sequential numbers. (*See Exhibit D - 1992 FCC Order ¶47; Exhibit E - 1992 FCC Order part 2 ¶47*)"

22. Many commenters cause confusion is regarding "capacity" and by redefining the terms of "system," "configure," "code" and "program." Within the industry, a "system" is something made up of components that work together to perform a single function. Merriam-Webster defines it as "a regularly interacting or interdependent group of items forming a unified whole." Some commenters will go as far as defining "system" as a certain feature within a complete system. The strategy is quite simple; take the term "automobile" for example. If a person is only limited to looking at the wheel and not the rest of the system, that individual will never find

anything with the capacity to transport someone. Some commenters redefine the term "configure," "code" and "program" to mean install, or create software that otherwise is not installed on the system. They will use these terms interchangeably to cause more confusion. Within the industry, "configure" would mean to select which features to use that are currently installed and present. "Code" and "Program" is defined by the industry as creating software that doesn't currently exist. The strategy again, is simple; introduce the term "configure" and later replace it with "program" or "code." Such commenters then take it further to demand that it require an analysis on that code, akin to doing an analysis on the alloy composition of the wheels on a car to determine if it is an automobile. This is in error.

23. The following is a simple illustration. Aspect refers to their predictive dialing mode as "cruise control." Think of the cruise control in a car. You have a vehicle that is "programed" or hard "coded" to go a maximum of 100 mph. You start the cruise control and "configure" it for 65 mph. You do not alter the automobile's capabilities based on that "configuration." The "human intervention" in decreasing the speed setting once in a while, "altering the configuration" does not change the "coding" or "programing" that would otherwise allow you to set the cruise control at a higher speed; you are simply adjusting the "pacing" as you would on a predictive dialer as you do not want to outpace the car in front of you or the call agents. This is how a "power dialer" works. Add the radar feature, found in some modern automobiles, and you have the equivalent of the predictive algorithm where automatic adjustments to the speed could be made if you are outpacing the call agents or the car in front of you. Both "predictive" and "power dialers" have been defined as autodialers for the last five decades, yet commenters switch words and their meaning around to effectively say adjusting the pacing requires a redesign of the system.

24. In my comments, dated June 12, 2018, I stated, "The mountain of verbiage which many telemarketers and debt collectors must deploy to explain their definition of an "ATDS" refutes their thesis far more convincingly than anything I could say."

25. As I illustrated in my June 12, 2018 comments, I illustrated how the petitioners change the definition of these terms to effectively define an ATDS as something that does not exist.

> In their petition, Section II bears the heading "THE COMMISSION SHOULD CONFIRM THAT TO BE AN ATDS, EQUIPMENT MUST USE A RANDOM OR SEQUENTIAL NUMBER GENERATOR TO STORE OR PRODUCE NUMBERS AND DIAL THOSE NUMBERS WITHOUT HUMAN INTERVENTION." Again, random or sequential number generators cannot store numbers. Computer storage has no processing function and is incapable of producing anything. This statement alone would prevent anything in the real world from ever being defined as an "ATDS," because it is impossible for any such device to exist.
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> Continuing in that section, petitioners state, "A device must be able to generate numbers in either random order or in sequential order to satisfy the definition. **Otherwise, the device cannot do anything 'using a random or sequential number generator**.'" (emphasis added). This statement falsely conflates the number generator with number storage and takes the focus away from the production of numbers. Again, random or sequential number generators do not have any ability to store anything but are used in production of numbers. Then, after switching those terms and their usage, petitioners repeat this claim where grammatically it seems to make sense, but on the technical level it is absurd, "This ability to store or produce telephone numbers to be called, alone, is insufficient; the clause 'using a random or sequential number generator' modifies this phrase, requiring that the phone numbers stored or produced be generated using a

random or sequential number generator." The absurdity of this argument can also be demonstrated by the example of loading every number listed in the Chicago White Pages into a predictive dialer, and dialing every number 10 times an hour for three days straight. Because the phone numbers came from a list rather than a sequential or random number generator, the Petitioners would argue that the dialer cannot be defined as an ATDS. Next, petitioners state their goal of excluding their systems from being within the definition of an ATDS by inserting the false notion that predictive dialers were an expansion of the ATDS definition in the FCC's 2003 Order, "Clarifying this definition (and rejecting earlier expansions that sweep all predictive dialers into the category of 'ATDS')." This statement exploits the Commissions oversight that the "predictive dialer" was specifically addressed in its 1992 order (*See Exhibit D - 1992 FCC Order ¶¶ 8-9; Exhibit C - 1992 comments to FCC*).

In their next statement, petitioners again artfully re-enforce this impossible technical description, "Such a clarification would help businesses and other legitimate callers by confirming that both elements must be satisfied for a device to constitute an ATDS." Next, commenters re-define "capacity" to mean "actually use" by defining it to active, present, and used at the same time, "To further remove any confusion, the Commission should also make clear that both functions must be actually—not theoretically—present and active in a device at the time the call is made." This takes the basic understanding of "capacity" from its designed capabilities to a level that consumers receiving these calls could never ascertain. For example, had the NFA defined a machine gun in this manner, no ATF agent would find a machine gun as nobody would demonstrate its use in full-auto mode in the presence of that ATF agent. Next, after redefining the terms, re-writing

history and inappropriately attributing number generators to storage, petitioners tell the Commission they are bound to their claims, "The FCC lacks the authority to go beyond the requirements of the clear statutory language." Again, re-writing history by exploiting the FCC overlooking that the "predictive dialer" was the focus in 1992 and is "ancient technology" verses "new technology," petitioners attempt to commit the Commission to their re-written history, "if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along." Next, petitioners define the system's "capacity" by its method of use rather than its actual capacity, "In clarifying which devices qualify as an ATDS, the Commission should hold that devices that require alteration to add autodialing capability are not ATDS." Next, petitioners re-enforce this by stating a fact, "To illustrate, smartphones require downloading an app or changing software code to gain autodialing capabilities. Those capabilities are not built in." This statement is in opposition to petitioners' statement they are relating it to. Petitioners are trying to relate the need to actually posses the autodialing software to having the software, but using it in another fashion. The idea is to validate a false statement by making a true statement and convincing the lay person both statements say the same thing when they most certainly do not.

Petitioners' next statement is rather clever, they contradict themselves to attempt to overcome a rebuttal, but then artfully use that to support their claim that "capacity" is not "capacity" but actual use, "By contrast, other calling equipment can become an autodialer simply by clicking a button on a drop-down menu. That function is already part of the device and requires a simple change in setting rather an alteration of the device. Devices with

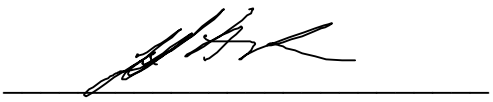
these inherent capabilities are an ATDS when these capabilities are in use." They then re-enforce this by comparing their predictive dialer with a smart phone (which in reality bear no resemblance), "Adopting this distinction would significantly narrow the range of devices considered ATDS, excluding smartphones, and comport with the statutory language."

Next, petitioners move on to the "human intervention" argument, "The FCC can take this opportunity to clarify that the absence of human intervention is what makes an automatic telephone dialing system automatic." Notice that petitioners will not apply "human intervention" to anything. I remind that there is a lot of human activity in a call center and autodialers, while they autodial phone numbers, they need to be instructed to dial those phone numbers before the system can actually dial them; a person will always be required to configure the autodialer to autodial phone numbers. Human activity will always be required to turn on the autodialer, load the list, set the schedule and press the "go" button. As I pointed out earlier, the Commission has applied "human intervention" to "dialing" only. Petitioners immediately follow up with quoting the Commission as they applied "human intervention" to "dialing" but ignoring that the Commission did so. Then petitioners apply "human intervention" to the generation of phone numbers, "The FCC should make clear that if human intervention is required in generating the list of numbers." On a technical level, this is an absurd statement. Petitioners are actually saying the system needs to generate phone numbers without being instructed to do so. I can not imagine a scenario where the autodialer will turn itself on, generate its own list of numbers, store that list of numbers and call that list of numbers all with no human involvement. Petitioners then justify this definition of "ATDS" with, "This comports with the

commonsense understanding of the word "automatic," and the FCC's original understanding of that word." Petitioners have it all wrong.

26. A cell phone is not an ATDS, for voice calls, because it requires acquiring software that enables autodialing. This is not a "configuration" but "installing" software, or writing "programs" to perform a function that is otherwise not available. A common question that has been presented to me is, "what about group texting." While carriers limit group texting to 10 or 20 members, the Commission may consider a common-sense exemption, similar to exempting a one-time confirmatory text message in the FCC's 2012 Ruling, *see In re Rules & Regulations Implementing the TCPA of 1991*, 27 FCC Rcd 15391, 15394 (F.C.C. November 29, 2012).

27. I declare that the foregoing is true and correct to the best of my knowledge, subject to the laws of perjury of the United States. Executed in Spring Valley, CA on this 17th day of October 2018.



Jeffrey A. Hansen